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No. 510

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

JOHN SYRES, LOUIS J. WARRICK AND LOCAL 254, OIL WORKERS INTERNATIONAL UNION, C. I. O.,
Petitioners

v.

OIL WORKERS INTERNATIONAL UNION, LOCAL #23, F. A. McDUFFIE, CHAIRMAN GULF MAIN PLANT GROUP AND GULF OIL CORPORATION, E. R. McADAMS, CHAIRMAN GULF WORKMEN'S COMMITTEE,
Respondents

PETITION FOR A WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Fifth Circuit

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Petitioners, John Syres and Louis J. Warrick, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled cause on July 18, 1958.

Citations to Opinions Below

The Judgment of the United States District Court for the Southern District of Texas is unreported and is printed in the accompanying record certified by the Clerk of the United States Court of Appeals, Fifth Circuit (R. p. 889). The opinion of the Circuit Court of Appeals is in the certified copy of the Record, p. 903, has not yet been officially reported.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on July 18, 1958 (R. 913). Rehearing was denied on August 29, 1958 (R. 926). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

Questions Presented

Whether damages may be recovered by a class, in a class action where the complaint seeks no individual recovery and where the evidence on trial seeks to prove no individual loss but loss to the Class?

Whether individual damages must be proved, by individual members of a class, in an action that alleges the negotiation by defendants of a racially discriminatory contract aimed at limiting the employment rights of a class, to-wit—Negro employees?

Statutes Involved

The statutory provisions involved are: The National Labor Relations Act, 29 U.S.C. 151, et seq.; 28 U.S.C. 1331, and Rule 23a(1), Federal Rules of Civil Procedure. These provisions are printed in Appendix A.

Statement

This is the second occasion that this case has been before this Court on petition for writ of Certiorari, the first occasion presenting the question of the jurisdiction of Federal District Courts to hear an action in which union members charge their exclusive collective bargaining representative with breach of the statutory duty imposed by the National Labor Relations Act to represent fairly and without racial discrimination. That issue was resolved in favor of these petitioners, *Syres v. Oil Workers International Union*, 76 S.Ct. 152, who are present petitioners and the cause was remanded to the District Court for a trial on the merits. That cause came on to be heard before a jury in the United States District Court for the Eastern District of Texas. Before, however, the cause was tried, the contract sued upon having expired and a new contract negotiated, on motion of respondent Gulf Oil Corporation, the action was dismissed by the District Court for mootness except insofar as the case asked for relief by way of damages. At the trial the petitioners offered no proof as to loss of wages by any individual employee whom they represent, but the proof was limited to showing that the action of respondents in negotiating the contract of April 17, 1954 damaged the class, qua class, by limiting their promotability for the term of the contract. Petitioners calculated their damages based on such factors as the incidence of recurring vacancies in the Operating-Mechanical Division to which they could not promote, the incidence of employees within the Labor Division who showed a desirability to promote, the weekly working hours and the differential between the Labor Division salary and the average Operating-Mechanical Division salary. The petitioners' theory advanced the idea that

the damages belonged to the class not to the individual members of the class, since the action complained of was directed at the class. The trial court rejected this theory of damages and instead submitted the cause to the jury upon instructions that they could only find for Plaintiffs if they found that some individual member of the class had come forward with proof of damages as to himself. The jury returned a general verdict for respondents on which judgment was entered. An appeal was taken to the Fifth Circuit of the United States Court of Appeals which affirmed the judgment of the trial court. A voluntary non-suit was taken as to the defendant Local 254 before judgment. The basis for federal jurisdiction in the District Court is based on Title 28 *U.S.C.*, Section 1331, this being a cause arising under the Constitution and laws of the United States.

Reasons for Granting the Writ

1. The question presented by the instant case is important because it involves the administration of the National Labor Relations Act, and a determination by the Supreme Court of whether the Plaintiffs may recover damages on behalf of the class whom they represent will have far reaching effect upon a large segment of labor that may be likewise encumbered by a similar contract. This important question has not been, but should be, settled by this Court. There are no cases which have come before this court or any other Federal Court which have raised this question or any question substantially similar. It is therefore important that the question be determined as to whether a person who, though entitled to injunctive relief as a member of a class, before he may get damages for a breach of statutory duty, must prove some actual loss of wages as to himself.

This theory may be adequate in other cases, but it does not suffice in the case at bar. Fact situations such as the one at bar are likely to frequently recur; for it is not untoward that the discriminatory contract stifles potential promotability, which cannot be measured in terms of loss of something once possessed rather than causing a loss of jobs presently held, the value of which can be exactly admeasured at an hourly rate. Hence, the importance of the question here is directly proportionate to the incidence of discriminatory contracts of the sort in question affecting a large section of the labor population. This case would therefore settle a principle for which there seems to be a dearth of authority.

The trial court and Circuit Court of Appeals adhered to the following rule which is a quotation from the decision of the latter court:

> "Damages may sometimes be recovered in a class action, but where the damages if recovered would be in different individual amounts to different individuals the persons entitled thereto must be made parties . . ."

The rules presuppose recovery by different persons of different amounts. The important question is whether in a case such as this persons may combine themselves together alleging joint injury and not claim different amounts. The rule of the two lower courts would seem to hold the Plaintiffs to a rule of damages that they neither alleged nor proved. This important question of federal law should be settled by this Court.

In *Long v. Dravo Corporation*, 6 F.R.D. 226, it was held that in an action by employees to recover vacation

pay under a collective bargaining agreement, alleged to be Forty Dollars ($40.00) per employee, that such an action could not be maintained as a "True Class Suit". This case clearly demonstrates that the test for determining the type of class action is revealed from the species of recovery to which Plaintiffs allege themselves entitled. It is also clear from this that this case brings into question for settlement by this court the question of federal law whether Rule 23 of the Federal Rules of Civil Procedure, providing for the true class action, is applicable in cases where the pleading and proof are as in the case at bar.

2. The court below has decided a federal question in a way which is in conflict with a decision of another court of appeals on the same matter. The court of appeals has decided that Rule 23, *Federal Rules of Civil Procedure* is not applicable in a class action to redress breach of the statutory duty imposed by the National Labor Relations Act. This decision is in direct conflict with a holding on the same issue in *Tunstall v. Brotherhood of Locomotive F & E*, (CCA). 148 F. 2d 403. In the *Tunstall* Case it is said:

> "Subsection a(1) of Rule (23) provides for class action where the character of the right sought to be enforced for or against the class is joint or common and the persons constituting the class are so numerous as to make it impracticable to bring them all before the court, the typical case of suit *by or* against *an unincorporated association*. Professor Moore in Federal Practice, Vol. 2, p. 2235 et seq. cites suits against unincorporated association as typical of what he calls the "True Class Suit" under the rule . . ."

True it is that in this action the "Association, Local 254 (now 4-254) has been dismissed as a party plaintiff, but that would seem to make little difference where, as here, the class represented is to some extent tantamount to the "association".

Argument

The holding of the court below establishes the two following rules or the two variants of the same rule:

(1) that damages may be recovered in a class action, the "true class suit", as where the recovery sought is joint, without joining all the members of the class as parties; and (2) that damages may not be recovered in the "spurious class suit" unless all the members of the class intervene as parties. The question arises with regard to the situations under which either of the rules would be applicable. That is, what will determine whether damages may be awarded a class in the absence of joinder of members of the class as parties? This then is essentially the question: what in the case at bar determines whether damages may or may not be recoverable by the class. It would seem to follow that the determination is to be made from an examination of pleadings and proof to determine what the parties are seeking. That is, are the damages sought several or joint? This can be determined only from an analysis of the manner in which Plaintiffs cast their case.

In the case at bar is it quite evident from both pleading and proof of Plaintiffs show no recovery sought independently on behalf of separate individuals, but rather the recovery sought is for the class, for an injury which has been done to the class, i.e., Negro employees and not to individuals. *Shain v. Armour & Co.*, 40 F. Supp., 488.

The necessity for such a rule as contended for by plaintiffs in this type of case is evident from the fact that no other measure of damage is possible. There has been an injury. No other measure of damages is possible because in truth wages, and promotions—which this honorable court designated as individually owned rights—are involved in suits such as this only in a metaphysical sense, and as such belong, conceptually, to a class of employees. It would therefore, be possible for any individual employee to prove loss of wages, for this would contemplate that there was something once possessed, or that because of conduct in the past, for the future period such could be anticipated. No such analysis can be applied to the facts in this case. No individual employee had wages cut off which he was earning in the Operating Mechanical Division of Gulf. As to the anticipation of wages, all employees share such anticipation, there is nothing distinct or different in this from man to man. The denial of the right to promote being inseparable with wages, all that has been said about wages applies with equal force to promotions. So the injury that has been done has been directed toward a particular class of employees, qua class, that cannot be denied, and the damages resulting have resulted to the class, qua class, in the form of loss of opportunities and anticipated progress up the economic scale. As plaintiffs' witness, Jacobs testified, he was hurt by the contract in suit "on the idea of potention that was involved." (R. 388). This, it cannot be denied, was exactly the same as to everyone in the class. Hence, the fact that John Syres did not bid for any job in the Operating Mechanical Division during the term of the contract of 1954 is an index to nothing. Would the court require plaintiffs to perform the

futile gesture of vain bidding? Nor can the situation in the case at bar likened to the situation where persons must attempt to use a facility before maintaining an action to prevent its segregated use.

Most of the cases cited by the court as supporting its general proposition that damages could not be recovered in a class action where the amounts recoverable by the different individuals would be different, are actions for damages under the Anti-Trust Laws wherein each Plaintiff was to recover lost profits. *Alabama Independent Service Station Association v. Shell Petroleum Corp.*, 28 F. Supp. 386; *Weeks v. Bareco Oil Co.*, 125 F. 2d 84; *Farmers Co-Op. Co. v. Socony-Vacuum Oil Co.*, 133 F. 2d 101; *Kainz v. Anheuser-Busch, Inc.*, 194 F. 2d 737. The case of *Citizen's Banking Co. v. Monticello State Bank*, 143 F. 2d 261, cited by the court in its opinion allowed a class action to be maintained, the court saying that the purpose of the action was to protect a particular trust fund in which none of the class has a particular interest, but in which there is only the pro-rata right of participation. This announces the principle which petitioner's urge upon this Court. No particular employee is seeking a particular recovery, but in whatever recovery there may be there will be a ratable participation.

Conclusion

For the foregoing reasons, this petition for a writ of ceriorari should be granted.

Respectfully submitted,

ROBERSON L. KING
Counsel for Petitioners

APPENDIX A

28 U.S.C. 1254. COURTS OF APPEALS—CERTIORARI—APPEAL—CERTIFIED QUESTIONS.—Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U.S.C. 1331. FEDERAL QUESTION—AMOUNT IN CONTROVERSY.—The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States.

§ 159. REPRESENTATIVES AND ELECTIONS—EXCLUSIVE REPRESENTATIVES; EMPLOYEES' ADJUSTMENT OF GRIEVANCES DIRECTLY WITH EMPLOYER.

(a) Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

RULE 23

Class Actions

(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it.

CERTIFICATE OF SERVICE

Copies of this Brief have been previously delivered to Counsel for Respondents.

ROBERSON L. KING

APPENDIX B

IN THE

UNITED STATES COURT OF APPPEALS

FOR THE FIFTH CIRCUIT

No. 16539

JOHN SYRES and LOUIS J. WARRICK, Appellants,

versus

OIL WORKERS INTERNATIONAL UNION, LOCAL 23, ET AL., Appellees

Appeal from the United States District Court for the Eastern District of Texas

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(July 18, 1958)

Before HUTCHESON, Chief Judge, and RIVES and CAMERON, Circuit Judges.

RIVES, Circuit Judge: Local 254 of the Oil Workers International Union[1] and John Syres and Louis J. Warrick, individually and as representing a class similarly

[1] Now Local 4-254, Oil, Chemical and Atomic Workers International Union.

situated, filed this action in May 1954 against Oil Workers International Union, Local 23,[2] certain of its officers, as individuals and as representing members of a class, and the Gulf Oil Corporation. The complaint alleged that the collective bargaining agreement of April 17, 1954, with Gulf as employer, divided the jobs between the races and discriminated against Negroes. The complaint further charged that all of the defendants had conspired to deprive plaintiffs and other Negroes represented by them of their rights guaranteed under the National Labor Relations Act and under the Constitution of the United States. The district court at first dismissed the action for lack of jurisdiction, and this Court affirmed, the present writer dissenting. *Syres v. Oil Workers International Union, Local 23*, 5th Cir. 1955, 223 F. 2d 739. The Supreme Court, in a brief per curiam, 350 U.S. 892, granted certiorari, reversed the judgment of this Court, and remanded the case to the district court for further proceedings, citing: *Steele v. L. & N. R. Co.* 323 U.S. 192; *Tunstall v. Brotherhood*, 323 U.S. 210; *Railroad Trainmen v. Howard*, 343 U.S. 768.

The collective bargaining agreement of April 17, 1954, claimed to be discriminatory was of eighteen months' duration. On March 14, 1956, a new labor contract covering the same employees was executed. This case was not reached for trial until October 1, 1956, about six months after the execution of the 1956 contract. The plaintiffs did not attack that contract as discriminatory or other-

[2] Now Local 4-23, Oil, Chemical and Atomic Workers International Union.

wise illegal, and, indeed, made no reference to it, but went to trial upon their original complaint. The defendant Gulf Oil Corporation moved to dismiss the action because it had become moot, and the district court sustained that motion "to the extent that all causes of action and claims for relief contained in Plaintiffs' said complaint save and except those relating to Plaintiffs' claim for monetary damages be and the same are hereby dismissed." The appellants do not complain of that ruling.

As a suit for damages, the case was tried before a jury. At the conclusion of the evidence, Local 254 withdrew as a party plaintiff. The district court submitted the case to the jury on behalf of the two individual plaintiffs and the class which they represent. The jury returned its verdict in favor of the defendants, on which judgment was entered. From that judgment the plaintiffs Syres and Warrick appeal, specifying as errors certain rulings upon the evidence and in the court's instructions to the jury, among others that the court erred "in its manner of instructing the jury in the question of damages."

Each of the defendants had moved for a directed verdict on the ground that there was no competent evidence of damage suffered by any plaintiff or by any member of the class, and that the evidence was insufficient to warrant the submission of any damages on behalf of any person. On such motions, the district court reserved its decision under Rule 50(b), Federal Rules of Civil Procedure. During the absence of the jury, however, the district court clearly indicated to counsel its opinion that the defendants

were entitled to a directed verdict because no damages had been proved.[3]

In addition to relief by way of injunction, now moot, the complaint had contained a general prayer for damages: "Plaintiffs further pray that this Court award them judgment for damages in the amount of one hundred fifty thousand dollars ($150,000.00)."

The theory upon which the plaintiffs undertook to establish their claim for damages is thus described in one of their requested but refused instructions:

> "The amount, of money, if any, to which the plaintiffs, Syres, Warrick, and those whom the named plaintiffs represent are entitled to is the difference between the average wage in the Operating Mechanical Division and that of the Labor Division, said average being the total of all salary items in either division, divided by the number of salary items in either division, times forty (40) (hour work week), times the number of weeks the contract of April 17, 1954, was in force, multiplied by the number of men that would have received such vacancies but for the contract of April 17, 1954."

[3] "The Court: The Court has indicated in conference with counsel for all parties since the close of the evidence in this case, the Court if of the fixed opinion that your objections to the Charge on damages insofar as it points out that there is no evidence in this record to which the jury could calculate the damages is well taken.

"Mr. Keith: Well, I understand.

"The Court: And that is why the Court has thought all along you were entitled to an instructed verdict in this case, but since the Court is going to submit the case to the Jury, I will overrule your objection and the objections of the remaining Defendants and the objections from the Plaintiffs. Mr. Marshall, tell the jury to go to the jury room and start its deliberations."

Testifying in support of that theory, Syres calculated the recoverable damages to be $1,000,580.80.[4] On cross-

[4] "Q. And could you determine—and this is on the question of how you have estimated the damages that you have asked for in this suit, how have you estimated the damages with regard to the vacancies that have occurred?
"A. Well, I worked it out according to the division and I take a figure that any operating mechanical division that the total salaries divided by the hours run into $94.92. And, divide it by the number of salary items that we have accumulated within the provision would be $41.00 which would give an average of $2.32, an average in the operating mechanical division per hour.
"Q. Now, let me stop you there, you say that the average wage per hour in the operating mechanical division is what?
"A. $2.32.
"Q. $2.32?
"A. And in the labor division, the average would be a $1.56. Average hourly wages.
"Q. All right. Now, that would give you a difference of what as between the average salary of the two?
"A. That would give me a difference of $.76.
"Q. Difference of $.76?
"A. And I figured also that the number of hours worked per week at $.76 per hour will give me $30.40 a week.
"Q. What does that represent, the $30.40?
"A. Well, that give me a difference in the rate between the operating mechanical division and the labor division provided my men had accepted this position and gotten a promotion.
* * * * * *
"Q. Go ahead?
"A. On the average of thirty dollars and forty cents per week, that is, for the two year period which is one hundred and four weeks, I figure it was $3,161.60.
"Q. Now, is that the figure per man?
"A. That is the figure per man.
"Q. Would that be a figure or at least would that be the total figure each man would have lost in operating mechanical division by not having been able to avail themselves of the opportunity of having worked?
"A. That is correct.
"Q. And how many men have you said wished to avail themselves of that opportunity?
"A. Well, I am thinking that the amount of seniority that my men would have had if the five hundred of them would have been eligible for these promotions if they had had an opportunity and

examination Syres expressed his hope that, in some manner not provided in the judgment sought, any recovery might be distributed through the local union.[5]

I multiplied five hundred times the $3,161.60 and I found the figure of one million, five hundred and eighty dollars and eighty cents, that is the total.
"Q. That is—that would be sufficient damages in this case which—
"A. (Interrupting) That is correct.
"Q. Which each man would have suffered?
"A. That is correct.
"Q. As an individual or total?
"A. That is right.
"The Court: That is just about ten times as much as you sued for.
"Mr. King:
"Q. Can you give some explanation why the difference between the amount that you originally calculated, could you say?
"A. You mean in the suit?
"Q. Yes?
"A. Well, first of all, we had no idea that it would run for this period of time, you see. We was thinking that it will be over in two or three months and we felt like we were justified in asking for a hundred and fifty thousand dollars."

[5] "Q. Well, now, who is going to get this money, John?
"A. Well, the local union if we get any.
"Q. You mean this million five hundred eighty thousand eight hundred dollars or you mean the $150,000? Who is going to get either or both?
"A. Well, the local union will get it.
"Q. And you are what in that local union?
"A. I am Secretary-Treasurer.
"Q. Well, who handles the money?
"A. I handle the money.
"Q. You handle the money?
"A. That is right.
"Q. Well, now, you are not going to give it to the members, if you get all of that money, you are not going to give it to the members?
"A. Well, that is going to be up to the members. If they want it, why, certainly.
"Q. But you are going to collect it yourself?
"A. If there is any I would like to collect it."
* * * * * *

The district court charged the jury that in the event of a verdict for the plaintiffs the damages should be determined on the basis of the actual pecuniary loss suffered by the individual plaintiffs or by those whom they represent.[6] To that charge, the plaintiffs objected on the ground

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"Q. But you are going to collect it and still you say that you are going to collect it for the benefit of the union or for the benefit of your members?
"A. Well, the members of the union, the funds are all allocated. That is how it is distributed.
"Q. Yes. And if those, now, those members are individuals, aren't they?
"A. Yes.
"Q. And if any money comes in there it comes in for their benefit?
"A. Yes."

[6] "Now, in the event your verdict is to be for the Plaintiffs, you should then consider the amount of damages, if any, which the Plaintiffs are entitled to recover herein. If your verdict is for the Defendants you need not consider the question of damage or the cause any further. If you find and believe from a preponderance of the evidence that the Plaintiffs, John Syres, Louis J. Warrick, and those whom they represent of either of them sustained actual pecuniary loss proximately caused by the wrongful acts of the Defendants, if you find the Defendants guilty of such wrongful act, you should find and declare the sum of money, if any you find from a preponderance of the evidence that would fairly and reasonably compensate them or either of them and each of them by such loss, if any, they have suffered.

"Now, in considering this matter, you should consider the following items and none other; first, the existence of vacancies to which the Plaintiffs or any of them and those whom they represent were refused promotion solely because of race. Two: the existence of vacancies to which the Plaintiffs or any of those whom they represent would have been entitled to but for the contract of April 17, 1954; and, the actual amount of money that the Plaintiffs or any of them whom they represent lost by reason of being deprived of those jobs solely because of their race.

"Now, to illustrate what the Court has last stated, I give you this example not meaning to convey to the jury that the Court believes from the evidence in this case any such situation exists, but solely for the purpose of illustration. Suppose one John Jones, we will say, a negro member of 254 and an employee of the Gulf Oil Corporation refinery in question desired to bid on a job in the

"that the proof was to be according to each individual man rather than as computed on an average basis."

Syres admitted that he did not bid for any job in the Operating-Mechanical Division, and that he had no knowledge of Warrick having done so. Warrick did not testify. There was a total absence of proof that any particular individual had suffered any damages by reason of the alleged discriminatory provisions of the 1954 contract.

Wages are, of course, separately and individually earned. Promotions and failures to promote are peculiar to the individual employee. There was no claim nor evidence that any of such individually-owned rights had been transferred either to the local union or to the plaintiffs. No law has been cited, and we have been unable to find any which would permit the plaintiffs to maintain this action for damages vicariously or to recover on some theory of averages. When, if the proper parties were before it, the court could award equal and exact justice, why should it

---

operational mechanical department and a vacancy in the operational and mechanical department occurred and John Jones, did, in fact, bid on that job and but for his race and the April, 1954, contract, he would have gotten that job. Then, to determine the amount of damages that John Jones sustained by reason of not getting that job on account of his race, you would determine from the evidence the difference between the wage he was being paid in the labor division and the wage he would have been paid in the operational mechanical division had he been given the job for the remainder of the term of the April, 1954, contract existing from the date he would have gotten that job and the expiration date of that contract. That would be the amount of damages that John Jones would be entitled to recover under such circumstances. And, of course, a similar statement with reference to the other negro employees of Gulf Oil Corporation in the same position, of course, would apply.

"And you verdict if to be for the Plaintiffs and you do find the Plaintiffs or those whom they represent have suffered damages will be for the Plaintiffs in the aggregate amount of the damages you find that the Plaintiffs or those whom they represent have sustained."

be required to render some rough or approximate judgment, rusticum judicium?

It is not enough to say that the right not to be discriminated against on account of race is joint or common and that a class action is maintainable under Rule 23 (a), Federal Rules of Civil Procedure. Granted arguendo, it nonetheless remains true that in such an action the class can obtain only that relief to which it is entitled. For example, here, the enforcement of the alleged discriminatory contract might have been enjoined if it had not expired and been replaced by one to which there was no objection. All that would be settled in such a class action is that Negroes as a class may not be excluded from jobs or promotion lists, may not be discriminated against because of their race or color. The necessary qualifications to hold any job or to merit any promotion are personal. A familiar analogy is supplied in school segregation cases, where, color aside, each individual must have the necessary qualifications to enter any particular school or college, and that is a matter which cannot be decided in the absence of the individual as a party.

> " * * * The representatives of the University seem to be apprehensive that a judgment in favor of all Negroes in North Carolina who may apply for admission to the University may deprive the Board of Trustees of their power to pass upon the qualifications of the applicants. Such is not the case. The action in this instance is within the provisions of Rule 23 (a) of the Federal Rules of Civil Procedure because the attitude of the University affects the rights of all Negro citizens of the State who are qualified for admission to the undergraduate schools. But we decide only that the Negroes as a class may not be excluded be-

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JOHN SYRES and LOUIS J. WARRICK,
Petitioners

v.

OIL WORKERS INTERNATIONAL UNION, LOCAL 23, ET AL.,
Respondents

BRIEF OF UNION RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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No. 510

IN THE

Supreme Court of the United States

October Term, 1958

JOHN SYRES and LOUIS J. WARRICK,
Petitioners

v.

OIL WORKERS INTERNATIONAL UNION, LOCAL 23, ET AL.,
Respondents

BRIEF OF UNION RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

This reply in opposition to the grant of certiorari is filed by respondent Oil Workers International Union, Local 23 (now Oil, Chemical and Atomic Workers International Union, Local 4-23) and E. R. McAdams, Chairman of the Workmen's Committee of the Local. The only other respondent, Gulf Oil Corporation, our alleged "co-conspirator", will file its own reply.

The caption of the Petition as printed is suggestive that Local 254, Oil Workers International Union is a party here. This Local Union, originally a plaintiff below, voluntarily withdrew as a party-plaintiff (Petition, p. 4; R. 770).

Another individual party, one F. A. McDuffie, originally a defendant, was voluntarily dismissed from the case by plaintiffs (R. 770).

With these corrections as to the parties, these union respondents accept petitioners' preliminary statement and statement of jurisdictional requisites, as well as the statutes involved. The decision below is now reported at 257 F. 2d 479. Rule 23(a) is reprinted herein at p. 31.

Questions Presented

Petitioners' two tendered questions reasonably identify the novel theory here urged as a ground of reversal of the judgment below. The two questions should be read with petitioners' ultimate contention: "No particular employee is seeking a particular recovery, but in whatever recovery there may be there will be a ratable participation." (Petition, p. 9.)

These respondents believe that a more accurate statement of the question presented is as follows:

In this suit for damages brought by two individuals as a class action under Rule 23(a) on behalf of the Negro employees in a plant, where the cause of action alleges a conspiratorially discriminatory contract, was recovery of damages properly denied where no evidence of financial injury to any individual member of the class was adduced?

A District Court judgment in favor of defendants was affirmed by the Court of Appeals because of the total lack of evidence of damages. The point was duly preserved at the trial by proper motions for instructed verdict under Rule 50 (b) which the court took along with the case as the rule provides. (R. 886, 888) Following a jury verdict for defendants on the question of liability, and judgment thereon, respondents advanced their point on damages as an additional ground of affirmance of the judgment plainly apparent in the record. *Jaffke v. Dunham*, 352 U.S. 280 (1957); *Story Parchment Company v. Patterson*, 282 U.S. 55 (1931); *Anderson v. Atherton*, 302 U.S. 643 (1937). This was sustained.

On the matter of liability, the question of conspiracy as pleaded by petitioners was submitted to the jury. The court's charge was in the image of the *Steele*[1] decision. Jury verdict on liability was in favor of defendants. Petitioners, as plaintiffs and appellants below, did not move for any form of instructed verdict under Rule 50(b), and did not complain at any point of the sufficiency of the evidence to support the jury's verdict. *Irvin Jacobs & Co. v. Fidelity & Deposit Company of Maryland* (C.A. 7, 1953), 202 F. 2d 794; *Harriman v. Mitland Steamship Line, Inc.* (C. A. 2, 1953), 208 F. 2d 564. Indeed the cause was submitted to the jury along the lines of petitioners' requested instruction on conspiracy. (R. 881.) Their appeal below consisted of an objection to one aspect of the court's charge and to the admission of two or three items of evidence. Respondents represent that none of these points reflected reversible error. However, the Court

[1] Steele v. L. & N. R. Co., 323 U.S. 192 (1944).

of Appeals, resting the affirmance on the question of damages, held "other claimed errors are, therefore, immaterial." (Petition, p. 22.)[2] In this case, therefore, there exist grounds for affirmance of the judgment outside of the question tendered here by these petitioners.

Statement

Supplementing petitioners' statement, and at points correcting, these respondents submit the following facts:

This suit was tried to a jury as a suit for damages incurred by Negro employees of the Gulf Refinery at Port Arthur, Texas, the claim being that the damages were incurred during the life of an 18-months collective bargaining contract, dated April 17, 1954. On March 14, 1956, a new collective bargaining contract covering the same employees was executed between Gulf and the union. This latter contract was not attacked by petitioners as discriminatory or otherwise illegal although the trial below was held beginning October 1, 1956, more than six months later.

The case was originally filed for injunction and declaratory judgment against the April 17, 1954, contract in addition to the claim for damages. After the expiration of the old contract and the execution of the new, the

[2] In the last paragraph of the opinion (Petition p. 22) appears the sentence: "None of the excluded evidence would have supplied the insufficiency in the proof of damages." This statement is entirely inadvertent. No evidence was excluded in this case and no complaint as to such a matter has ever been made by petitioners at any point. The balance of the Court's opinion, we think, demonstrates the validity of this correction which is noted here to avoid confusion.

District Court dismissed all "causes of action and claims for relief" save and except those relating to "plaintiffs' claim for monetary damages." Petitioners did not complain of that ruling, did not amend their pleadings, but elected to go to trial for damages *only* incurred during the period the 1954 contract was effective.

As will be seen, the essence of the case as tried was a claim that the demanded integration was not rightly accomplished nor timely perfected, that the 1954 contract was a step in the wrong, not the right, direction, and that damages should be paid for these claimed errors.

Petitioners here state that they offered no evidence of monetary damage to any individual in the class, advancing their theory of "averages" and "pro rata participation" as a satisfactory substitute. While respondents will demonstrate that there is no merit to this contention and that the absence of proof of damages was fatal to the case, we also think it relevant to call attention to the fact that the Petition does not disclose the factual background in which this contention is raised. The background illustrates further the error of petitioners' contentions because this record shows that integration, when demanded by the Negroes, was promptly put into effect by a plan which failed for the precise reason of lack of qualifications by some of the individual Negroes who were placed on the skilled jobs of the company. It proved necessary to apply qualification standards equal to those demanded of and exhibited by the white employees by a substitute plan which involved many intricate compromises between the company and union bargainers. Furthermore, frankly, this respondent union, believing that it has properly and effectively shouldered its statutory responsibility, does not

wish it to be assumed *sub silentio* that this is but another story of dereliction or evasion by a certified bargaining agent which is insensitive to the rights of the minority and is hiding behind points of law.

To the contrary, believing that the light of day on the facts strengthens respondents' legal and equitable position, we have reproduced a factual summary of the case with appropriate record references as it is set forth in our brief in the Court of Appeals. See pp. 19, et seq., *infra*.

In short, since 1901 and for 43 years before the coming of the union, Gulf has hired Negro employees in the labor classifications and white employees in the operating and mechanical jobs. In 1943, the union came in the form of two jointly certified local unions, Locals 23 and 254, whose memberships are, respectively, white and Negro. These two were and are the joint owners of the bargaining rights.[3] Respondents proved and petitioners conceded at the trial that from the 1943 beginning to the end of 1953, the insistent policy of Local 254 (the Negro union) was the maintenance of the existing division of the jobs. Without doubt the early origins of this policy lay in the desire to maintain the relative job distribution for the benefit of the Negroes and to forestall and prevent the then current sordid episodes which existed in the railroad industry and which culminated in the 1944 decision in *Steele v. Louisville & N. R. C.*, 323 U.S. 192.

The position so taken by Local 254 was effectively implemented by it in the exercise of its rights as jointly certified bargaining agent.

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[3] In the Matter of Gulf Oil Corporation (Port Arthur Refinery) and Oil Workers International Union, Locals 23 and 254, Cause No. 16-R-557, 58 N.L.R.B. 978.

But old patterns break down. In 1953, agitation began among some Negro employees for a new system. Negotiations of December 23, 1953, led to an amalgamation of the two groups on January 5, 1954. Answering the demand for integration, and acting by authority of Local 23, respondent E. R. McAdams advised Gulf that the union "expected the company to fill all jobs according to the contract." The meaning of the demand was a reversal of previous policy. Gulf called for a meeting seeking clarification of the demand which changed the practice of fifty years, ten of which, it remarked, had been under union contract. Gulf, being satisfied that the union's answers meant "complete integration", promptly agreed. It so happened that the labor contract at that time was open for negotiation and was effective on a day-to-day basis. Therefore, Gulf was in position to try the new system since it was not then tied to a lengthy contract. The new program was initiated as demanded, but over a period of four weeks two unexpected problems developed: (1) A severe unrest within the plant accompanied by various ugly incidents which caused apprehensions concerning safety of the plant, and (2) job vacancies were being filled by unqualified bidders. For these reasons, Gulf discontinued the filling of vacancies, acting on its own.

The first problem was met and overcome by the union through an educational program.

The second problem proved more complicated than the union had imagined. Gulf demanded time to find a system of selectivity which would assure it of qualified bidders for the jobs. This was so because the company's minimum qualifications for employees to enter the operating-

mechanical division were a high school education and the ability to pass certain standard intelligence tests. On the other hand, Negro employees had never been selected on that basis, their qualifications being simply an ability to read "No Smoking" signs. Pending study and solution, Gulf was willing, and the 1954 contract did provide, that 76 selected jobs theretofore a part of the operating-mechanical division would be made available to the bid of Negro employees. But, Gulf would not go further *that day* pending such study. Gulf further agreed that the ten Negro employees who had actually bid into and had remained in the operating-mechanical division would not be disturbed. It gave full assurance that it was committed to the principle of integration and merely needed time to study the problem.

The union then proposed that the 1954 contract include Stipulation 33 by which it was specially agreed that continuing meetings would be held concerning solution to the racial problem. To this the company agreed and the record shows that the continuing study was fruitful.

From that point forward, the record shows active movement by Local 23 in terms of proposals and counter-proposals to the company and to Local 254. The record also shows reticence and deliberate withholding of co-operation by Local 254. The methods and solutions which were finally found are described in the Appendix. No complaint is made of these.

The record shows that this was the first plant in the Gulf Coast area of the oil industry to make this reversal and the solutions which were eventually designed were not quickly discernible for the lack of industry experience.

Our purpose in inviting this Court to review the collated evidence and history in the Appendix is to show the Court that Stipulation 33 meant exactly what it said; that Local 23 turned to the task at hand within ten days of the April 17, 1954, contract, before this litigation was filed, and did not rest until the solution was found; that the company, for its part, carried out its promises fairly and demanded only due consideration of relevant factors necessary to the operation of its business; that petitioners, as well as Local 254, obstructed progress by refusing to meet in the beginning, by refusing to lend their economic and mental powers to the problem, by refusing to take a position in the bargaining, and by even scuttling the efforts of a duly authorized committee of Local 254 to bargain to a successful solution.

Although it is a matter of common knowledge, the enormous complexity of this modern refinery was proved in the record. In the exercise of its unilateral right of employment to fill its skilled jobs, Gulf has established minimum educational and mental qualifications and in addition has strenuously defended its right to a probationary period during which it made practical observation of the potential of these employees. The reversal of this policy of selectivity and probation is described in the Appendix and the necessary compromises between the company and the union are set out. Arms length bargaining became necessary, but in the end the problem was solved to the reasonable satisfaction of all. Every facet of the negotiations and compromises concerned relevant factors as defined in *Steele*. The record is devoid of ugly, telltale signs that either the company or the union was in fact motivated by irrelevant or invidious motives. The

76 jobs immediately made available to the Negroes were those in which the company could readily waive qualifications, and represented a step forward and a down payment on the ultimate result.

Like Voltaire, these respondents defend violently petitioners' right to maintain this litigation and to believe in the just and right of it. But from respondents' standpoint, we think the case was properly decided by the verdict against which no attack has been made. Whether we adopt in this case the conception of "deliberate speed" as laid out in the *Brown* case,[4] or whether some other test for this class of cases be found, it is self evident that the negotiators must in some way be given some reasonable time to extricate the relevant from the irrelevant in reversing established practices in the interest of conforming to the statutory obligations. At least this is true where the established practices exist by the active procurement of a minority group which is joint owner of the statutory bargaining power as distinguished from disfranchised or disregarded persons as has been the case in the decisions thus far.

Reasons For Denying The Writ

1. Nothing in the opinion below weakens the statutory obligation of a bargaining representative under the National Labor Relations Act, as amended, and no question is raised as to effective enforcement of the duty by injunction, declaratory judgment, damages or any other suitable remedy or redress known to law. This respondent union has at every point in this affair and in this litigation

[4] **Brown v. Bd. of Education of Topeka, Kansas,** 349 U.S. 294 (1954).

acknowledged its plain duty as declared in *Steele* and related cases. The acknowledged existence of the duty has been the starting point of both courts below.

2. Nothing in the opinion below impairs the class action under Rule 23(a). The employment of this useful procedural device has been widely and uniformly approved in racial discrimination cases by the lower courts[5] and by the Fifth Circuit.[6]

3. The class action, formerly as a creature of equity and now as Rule 23(a), is a procedural device to facilitate litigation which otherwise would be embarrassed by sheer numbers or sometimes by necessary absentees from the jurisdiction of the court. *Moore's Federal Practice*, 2d Edition, Sec. 23.02; 23.03. As a procedural device which allows the case to proceed, it does not dispose of the normal elements of proof necessary to establish the right to recovery. Neither does it permit the class representative to decide to alter the rights of the members of the class by homogenizing the recoverable damages of each individual in the class. If it did so permit, constitutional problems of due process more severe than those now present would follow. Cf. *Hansberry v. Lee*, 311 U.S. 32.

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[5] **Johnson v. Board of Trustees of U. of Ky.** (E.D. Ky. 1949), 83 F. Supp. 707; **Kansas City, Mo. v. Williams** (C.A. 8, 1953), 205 F. 2d 47, cert. den. (1953), 346 U.S. 826; **Vann v. Toledo Metropolitan Housing Authority** (N.D. Ohio), 113 F. Supp. 210; **Constantine v. Louisiana Institute** (W.D. La. 154), 120 F. Supp. 417; **Hunter v. Atchison T. & S.F. Ry. Co.** (C.A. 7, 1951), 188 F. 2d 294, cert. den., 342 U.S. 819; **Wilson v. Beebe** (D.C. Del. 1951), 99 F. Supp. 418; **Gonzales v. Sheely** (D.C. Ariz. 1951), 96 F. Supp. 1004.

[6] **Bryce v. Byrd** (C.A. 5, 1953), 201 F. 2d 664; **Avery v. Wichita Falls Ind. School Dist.** (C.A. 5, 1957), 241 F. 2d 230; **Orleans Parish School Board v. Bush** (C.A. 5, 1957), 242 F. 2d 156.

4. Petitioners are plainly in error in the contention that pro rata recovery is allowable by force of the rule. Assuming arguendo that a discriminatory contract existed, admittedly an individual qualified Negro employee could sue for his damages and prove that upon his qualifications and seniority he would have occupied a certain job of improved pay for the duration of the contract. By what theory could his right to the proper amount of his damage be altered in favor of division of the amount with another of the class who had neither the qualifications nor the seniority to occupy a higher job? This is the effect of the "averaging" procedure which petitioners advance.

5. The Court of Appeals was right in recognizing that wages, promotions and failures to promote are peculiar to the individual employee and are separately and individually earned. (Petition p. 20). Since the very purpose of the statutory duty is to remove race as an item of consideration and to allow each man to stand upon his own merits, it follows that any individual's monetary damage is the difference between what he did earn and what he would have earned upon his individual merit, as the court held (Petition p. 22).

Argument

Petitioners say that no case here or in any other federal court has raised this or a substantially similar question. (Petition p. 4). Respondents likewise find no such case. The reason, we think, is because petitioners' contentions are entirely at a tangent to sound doctrine under Rule 23.

Rule 23 has developed well since its adoption. A reading of Professor Moore's annually supplemented treatise on

Federal Practice, 2nd Edition, discloses no complaint and no instance in which Rule 23, when needed, has been held unavailable in at least one of its subsections of true, hybrid or spurious to facilitate causes within its ambit. A prominent statement among the lower courts is that of the 8th Circuit in *Montgomery Ward v. Langer* (1948), 168 Fed. 2d 182:

> "By Rule 23 the Supreme Court has extended the use of the class action device to the entire field of federal civil litigation by making it applicable to all civil actions. The usefulness of the device in its new environment will depend largely upon the attitude of the courts. If the device is to be loaded down with arbitrary and technical restrictions, it will serve no very useful purpose in the enlarged field. If, on the other hand, the courts will disregard the ancient and often arbitrary restrictions between actions at law and suits in equity and will permit the rule to operate in all cases to which it justly and soundly may be applied, it will serve its intended purpose. Like most procedural devices, its usefulness is susceptible to being nibbled away by those who regard it as an unwelcome stranger in an unsuitable environment."

In the racial discrimination cases its acceptance has been universal so far as we can find.[7]

An important caveat that goes with the rule, however, is the concern for fairness and due process to the absent members of the class. Much of the problem has been answered by the universal holdings, that res judicata does not apply to impersonam aspects of hybrid or to any

[7] Footnotes 5 and 6, supra. And see summary by the 8th Circuit quoted on this page above.

aspect of spurious class actions.[8] In true class actions, res judicata is said to apply where the precautionary aspects of the class action device are followed such as adequately of representation and identity of interest between representative and class. *Hansberry v. Lee*, 311 U.S. 32 (1940). From the standpoint of plaintiffs, if the representatives of the class win the case, no problem of unfairness to any absentee arises because the position of one and all has been enhanced by the judgment as to any matter in which the interest of each member of the class is identical. It is the possible litigation casualty which causes the problem. Here, due process is thought to be satisfied by the fact that there is indeed a day in court where rights are advocated and tried by representatives who by definition are of equal zeal and motive with each absent member. If the assumed definition of the representative proves untrue in fact, the departure from due process is so great as to authorize even federal interposition against state decisions which attempt to bind the absentees to the actions of the representatives. *Hansberry v. Lee*, supra.

Petitioners here approach the subject from the opposite direction. They assert the right to meld the monetary recovery of some individuals who are assumed to have been damaged into a pot to be shared by others who individually sustained no monetary damage. With this right in hand (simply acquired by their own pleadings) petitioners then use it to dispense with the need for any proof of monetary damage to any individual. Obviously this cannot be.

There is no merit to the makeweight argument that here such a rule is a necessity. In this case, each and every mem-

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[8] Moore's Federal Practice, 2d Edition, Sec. 23.11, pp. 3456-3472.

ber of the class works within the very county where the cause was tried and is of known identity and seniority date. Every job opening is known by its date and place since it was occupied by someone. The calculation of monetary damages as to any individual is a fairly precise matter.

The decisions below have regarded class actions in racial discrimination cases as proper spurious class actions under subdivision (3) of Rule 23a. A quotation from an opinion of the 8th Circuit in *Kansas City, Mo. v. Williams*, 205 Fed. 2d 47, at pp. 51-52, cert. denied, 346 U.S. 826, illustrates the view:

> "It is of course necessary generally that a plaintiff be able to show injury to himself in order to entitle him to seek judicial relief. He cannot be a mere volunteer and ask judicial intervention simply 'because someone else may be hurt', but he 'must present facts sufficient to show that his individual need requires the remedy for which he asks.' McCabe v. Atchison, T. & S. F. Ry. Co., 235 U.S. 151, 162, 164, 35 S. Ct. 69, 71, 59 L. Ed. 169. But where he is able to establish his right to individual relief on this basis, he may also under certain conditions ask that the benefit of that adjudication be extended to others, where they constitute a class standing generally in the same legal situation, where they are so numerous as to make it impracticable to bring them all before the court, and where the granting of such relief seems likely to serve some useful legal purpose—for example, preventing a multiplicity of suits.
>
> "Violations of the Fourteenth Amendment are of course violations of individual or personal rights, but where they are committed on a class basis or as a group policy, such as a discrimination generally because of

race, they are no less entitled to be made the subject of class actions and class adjudication under rule 23, Federal Rules of Civil Procedure, 28 U.S.C.A., than are other several rights. And the District Courts, where the question has so arisen, have practically unanimously so recognized. See, e.g., Gonzales v. Sheely, D. C. Ariz., 96 F. Supp. 1004; Wilson v. Board of Sup'rs of La. State University, etc., D.C. La., 92 F. Supp. 968; Johnson v. Board of Trustees of University of Kentucky, D. C., E. D. Ky., 83 F. Supp. 707; Davis v. Cook, D. C., N. D. Ga., 80 F. Supp. 443; Lopez v. Seccombe, D. C., S. D. Cal., 71 F. Supp. 769—to give but a few examples. See also Alston v. School Board of City of Norfolk, 4 Cir., 112 F. 2d 992, 997, 130 A.L.R. 1506; City of Birmingham v. Monk, 5 Cir., 185 F. 2d 859."

We doubt that the right of each man to be treated as an individual without reference to his race is a "joint or common" right within the meaning of subdivision (1) of Rule 23(a). It is an individual right. The principal and concurring opinions in *Cassell v. Texas*, 339 U.S. 282 (1950), a grand jury case, leave no doubt that the true function of the constitutional mandate is to remove race as a factor so persons may "be selected as individuals, on the basis of individual qualifications, and not as members of a race." 339 U.S. at p. 286. For this reason, the selection of a person because he *is* a Negro (for example, proportionate representation) is just as illegal as the rejection of him for the same reason. Racial discrimination *as a policy* may be attacked in class actions under Rule 23(a)(3) because, although the right is "several"—"there is a common question of law or fact affecting the several rights and a common relief is sought."—as Subdivision 3

provides. Racial discrimination may be equally attacked by a single individual to vindicate his own personal rights and to recover his personal damages.

Be that question as it may, the Court of Appeals here gave unqualified approval to the availability of Rule 23(a) to obtain injunction and declaratory judgment. The Court went further and approved the use of Rule 23(a) in damage suits provided evidence of damage sustained by individual members of the class be offered. The decisions cited by the court in its Footnote 7 (Petition, p. 22) all hold that the mechanics of collecting damages for separate individuals in different amounts is by intervention of the individuals and by proof of their respective damages. In this connection, it should be noted that it has been authoritatively held that the fact that different individuals in the class are entitled to different amounts of damage does not prevent the case from being one for "common relief" within the meaning of Rule 23(a), Subdivision 3. *McGrath v. Tadayusee* (C. A. 9, 1951), 186 F. 2d 766, 769-770, cert. den., 342 U.S. 832; *Oppenheimer v. F. J. Young & Co.* (C. A. 2, 1944), 144 F. 2d 387, 390; *Weeks v. Bareco Oil Co.* (C. A. 7, 1941), 125 F. 2d 84, 88. Regardless of whether in some imaginable case in the future, individual damages may be held collectible without the individual's intervention, the total absence of any evidence of individual monetary damage is sufficient to support this particular judgment and, indeed, to compel it.

For the foregoing reasons these respondents submit that theory advanced by petitioners is at odds with both the function and use of Rule 23(a). It is, likewise, contrary to the thrust of the constitutional principle involved and

to the implied statutory obligation which reflects the same policy. The case was rightly decided according to law. Notwithstanding this litigation casualty, the important principles which forbid racial discrimination are entirely unimpaired. Rule 23(a) remains entirely available for the vindication of rights in this class of cases.

Conclusion

WHEREFORE, these respondents pray that the petition for writ of certiorari be denied.

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Certificate of Service

This reply has been served upon all counsel in the case prior to the filing thereof and certificate of service has been duly lodged with the Clerk of the Court.

CHRIS DIXIE

APPENDIX

(From Respondents' Brief in the Court of Appeals)

FACTUAL SUMMARY

Since the establishment of the Port Arthur Refinery in 1901, the Company has had a complete unfettered right to select employees and prescribe their qualifications (Tr. 504). The Company never bargained away these rights (Tr. 505). Before the coming of the Union, the Company hired negro employees in the labor classification and white employees in the operating and mechanical jobs (Tr. 505).

The Union came into existence at the refinery in the year 1943 (Tr. 503) when the jointly certified Locals 23 and 254 took over their representation. In 1943 representatives of the negro local, exercising their statutory bargaining position, demanded that the jobs continue to be divided between the races as they theretofore existed. When Gulf refused to put such a provision into the contract, the representatives of Local 254 insisted that the same program be made a matter of agreed policy (Tr. 620-622). Thereafter, throughout the years the Workmen's Committee composed of 8 representatives from Local 23 and 4 representatives from Local 254 (Tr. 262) insisted that Gulf recognize this policy (Tr. 262). Plaintiff John Syres admitted that this was the policy of his group (Tr. 260). The record shows that Local 254 was insisting on this policy as late as November 1953 (Tr. 556). Gulf agreed informally (Tr. 554). Needless to say, the negroes utilized their position as jointly certified bargaining agent to accomplish this result.[1]

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[1] **In the matter of Gulf Oil Corporation** (Port Arthur Refinery) and **Oil Workers International Union, Locals 23 and 254**, Cause No. 16-R-557. 58 N.L.R.B. 978.

But old patterns break down. In 1953 the agitation began among some negro employees for a new system. As Appellants' brief shows, negotiations of December 23, 1953 led to an amalgamation of the two groups on January 5, 1954 (Appellants' Brief, page 3).

Answering the demand and acting by authority of Local 23, the defendant, E. R. McAdams, advised Gulf promptly thereafter that the Union "expected the company to fill all jobs according to the contract" (Tr. 557). The meaning of the demand, of course, was that the previous policy of Local 254 was reversed and that on any job opening in the operating and mechanical division the company would now receive and should recognize the bid of a negro employee on the basis of his seniority. The company's reaction was "what is the contract?" (Tr. 557); for it was now faced with a new interpretation (Tr. 558). On January 20, 1954, the company called in the union to request further clarification of the demand which, it remarked, changed the practice of 50 years, 10 of which had been under written contract (Tr. 869). The statement of the company to the union is Gulf's Exhibit 4 (Tr. 868-870) and is a document remarkable for its res gestae character. Following the reading of its formal statement, Gulf propounded 23 questions to the union, which are set out with the answers in the record at pages 872 to 880. A company witness testified that the union's answers meant "complete integration" (Tr. 558).

Gulf concluded to accept this principle (Tr. 556) and from there forward there was no problem except how to make it work (Tr. 566).

Gulf presented testimony that it concluded to go forward with the demand as made because it so happened that the labor contract at that time was open for negotiation and was effective on a day-to-day basis (Tr. 508). It knew that if the program did not work, it could promptly cancel the contract. This was a very important factor in its decision (Tr. 559, 520). Gulf believed that the bidding by the negroes would be selective as the negroes indicated (Tr. 560-561).

The new program was initiated as demanded, and over a period of four weeks two unexpected problems developed.

(1) A severe unrest developed in the plant among the white employees: Ugly racial signs appeared; there was tampering with personal property; bicycle tires were cut; truck keys were stolen; frigid personal relations developed in the plant (Tr. 518). There was an incident of physical contact between white and negro (Tr. 702). Negroes were handed the keys to high-pressure stills and invited to operate them (Tr. 702). There were threats; water was placed in gasoline tanks (Tr. 658). A union witness testified to his concern that the union itself was faltering (Tr. 658). The company developed the worst apprehensions concerning the safety of the plant (Tr. 518) and, in this, their sincerity was not doubted by the union (Tr. 659).

(2) Even deeper, however, was the company's concern with a fast developing problem of efficiency of operations (Tr. 659). It developed that the jobs were being filled by unqualified bidders (Tr. 586). An excessive burden was thereby thrust on supervision (Tr. 586). Under the new system the company's right of original selection establish-

ment of educational qualifications, and its pre-existing probationary period was lost (Tr. 586-588). Disqualification of employees and consequent arbitration were cumbersome and unsatisfactory (Tr. 586). The ratio of disqualifications rose sharply (Tr. 603-604).

For these reasons, Gulf discontinued the filling of vacancies acting on its own (Tr. 563).

As to the first problem, the unrest in the plant, the union did not surrender to this circumstance. It initiated an education program which was, in due course, successful (Tr. 708-709).

As to the second problem, the question of the qualifications of the employees, the problem was more complicated than the union imagined. Gulf had to be heard. Gulf demanded the time and opportunity for further study of the problem and advised the union that it was not willing to continue with the union's proposed system of January 195 and was not willing to go further than the contract of April 17, 1954 (Tr. 524). As far as the company was concerned the union would have to strike on that issue to compel the company to go further *that day* pending such further study (Tr. 524).

Gulf was willing, and the 1954 contract did provide, that 76 jobs theretofore in the operational-mechanical division would now be made available to the bid of negro employees (Tr. 582). On these jobs the company concluded that it could waive educational and other normal required qualifications (Tr. 582-583).

Although it is a matter of common knowledge, the enormous complexity of this modern refinery was proved in

this record (Tr. 470-481). For instance, there are more than 250 different job classifications in the bargaining unit (Tr. 158-164). In the exercise of its right of unrestricted selection of employees, Gulf has never hired an employee for his ability to perform a bottom job, except during the manpower shortage of World War II (Tr. 511). Gulf's selection of an employee has always rested upon his potential ability to handle a top job (Tr. 511) and to thereby assume responsibility for the safe operation of enormously valuable, but dangerous equipment (Tr. 510).

Employees have been hired at the bottom and progress upward through "lines of promotion" which requires an increasing demand on the employee's potential (Tr. 509-511). Therefore, minimum required qualifications for employees to enter the operating mechanical division are a high school education, and ability to pass certain standard intelligence tests (Tr. 525; 569) which are prepared for industry at large by professional concerns in this field (Tr. 569).

Furthermore, the company has always retained a six months probationary period for each new employee, during which an employee may be discharged without recourse (Tr. 512). This, of course, is an important selective process for the company. The union has tried to bargain a shorter probationary period but the company has stood adamant throughout the years (Tr. 587-588). Gulf has never agreed to a seniority clause based solely on length of service (Tr. 481). It is elementary that the seniority clause which it accepted in its bargaining with the union presupposes the right of selection, the quali-

fications, and the probationary period which go hand in hand with it.[2]

On the other hand, the employees in the labor department were not selected on that basis. Their qualifications were simply an ability to read no smoking signs (Tr. 476). The probationary period of these employees was never used to determine the potential of these employees to handle the operating mechanical division jobs (Tr. 588).

In taking the position that it did as to the April 1954 contract, the company not only waived qualifications on 76 jobs but it agreed to leave ten negro employees who had actually bid into and had remained in the operating mechanical division in their new line of promotion (Tr. 616). It gave full assurance that it was committed to the principle of integration and merely needed more time to study the problem (Tr. 580). The union proposed (Tr. 524) that the same 1954 contract include Stipulation 33 (Tr. 306) by which it was agreed that continuing meeting would be held concerning this racial problem (Tr.

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[2] See **Aeronautical Industrial Dist. Lodge, 727 v. Campbell**, 337 U.S. 521, 93 Law Ed. 1513, 69 Sup. Ct. 1287 (1949):

"All these variations disclose limitations upon the dogmatic use of the principle of seniority in the interest of the ultimate aims of collective bargaining. Thus, probationary conditions must often be met before seniority begins to operate; sometimes it becomes retroactive to the date of employment; in other instances it is effective only as from the qualifying date; in some industries it is determined on a company basis, in others the occupation or the plant is taken as a unit for seniority determination; sometimes special provisions are made for workers in key positions; and then again these factors are found in varying combinations. See Williamson & Harris, Trends in Collective Bargaining, 100-102 (1945); Harbison, Seniority Policies and Procedures as Developed through Collective Bargaining 1-10 (1941)."

306; 524). The company gave its agreement (Tr. 525) and the record shows that the continuing study was fruitful.

Gulf based its position squarely upon the fact that from the standpoint of qualifications of employees it could not operate on the high percentage of disqualifications which resulted from the union's proposal (Tr. 584). Since the ascending jobs in its lines of promotion required increasing brain power and education (Tr. 510) it could and would have been dangerous to continue with that system (Tr. 494). It thereby based itself squarely on relevant factors as defined by the Supreme Court in the *Steele* decision. No item of suspicion or question has been cast upon the employer from the standpoint of the motive with which these claims were advanced. The only question in this case, therefore, is whether the union was under duty to pay no attention to these relevant factors when it knew full well that Gulf was absolutely right (Tr. 722).

As stated, the parties specially reserved by Stipulation 33 the question of this racial problem for continuing study and solution. In these bargaining relationships, there is one pattern which has become commonplace. Each year the Company brings its money to the bargaining table for wage increases and other benefits, and it expects in return a contractual agreement of some duration, including especially a no-strike clause. The execution of the contract, itself, is the desirable policy of the National Labor Relations Act, 29 *U.S.C.A.* 158(a)(5); 29 *U.S.C.A.* 158(b)(3). In mature bargaining, many matters are solved and agreed upon during the course of the contract. Indeed, in some instances, there is a continuing obligation to bargain during the course of the contract on matters not

settled by the contract itself. *The Jacobs Manufacturing Co.*, 94 N.L.R.B. 1214 (1951), Affm'd. *N.L.R.B. v. Jacobs Manufacturing Co.*, 196 Fed. 2d 680 (C.A. 2, 1952).

In this case, since the contract brought the traditional wage increases to all, including all negro employees, there was no reason why the other issues of the bargaining could not be settled while the racial problem was under study. Conversely, it cripples the congressional policy to say that nothing may be settled until everything is settled.

The record shows that after the 1954 contract was duly ratified Local 23, within ten days, contacted Local 284 for a meeting to find further solution to the problem (Tr. 661). This was done before notice of this litigation or the employment of plaintiffs' counsel in this case (Tr. 663). Such a meeting was held on May 14, 1954 to explore the problem and was adjourned on the basis that Local 284 would present a proposal to Local 23 before June 1, 1954 (Tr. 663-664).

In the meantime counsel for Plaintiffs here had notified Local 23 of his representation "for the purpose of affecting a change" in the seniority provisions (Tr. 840). On May 11 the Local 23 responded that it would answer as soon as possible and that the attorney's letter was being considered (Tr. 792). On May 17 the attorney responded, thanking Local 23 for its prompt reply and its assurances and stressing the importance of time (Tr. 792-793). On May 19, 1954 Local 23 wrote the attorney that a meeting between the two locals had been held on May 14, 1954 and that it recessed on the basis that Local 284 would present a proposal before June 1 (Tr. 793-794). Local 23 never received the promised proposal (Tr. 644), but was served instead with this law suit (Tr. 665) which

has been described in this record by Plaintiffs as a "part of the strategy" of the Plaintiff group (Tr. 768). As to the proposed meetings between the locals, 18 members of the Executive Board of Local 23 appeared but only one person from 254 (Tr. 665). This required a rescheduling of the meeting, but the Plaintiff John Syres, soon advised Local 23 that such a meeting was "untimely" and that Local 254 would not meet (Tr. 636).

In September, 1954 Local 23 espoused and submitted a proposal to solve the problem which is known in this record as the Aiken Plan (Tr. 794-796; 708). This was submitted to both the Company and Local 254 and was rejected by both (Tr. 709; 848-849).

On November 13, 1954 Local 23 wrote the Plaintiff Syres that his group had not been willing to meet to find a solution, that Local 23 is willing to meet, that Syres' people had declined to give help "and had left it up to us to find the answer under penalty of being sued for enormous sums of money if we do not immediately solve every problem which has hung over since the Civil War" (842-84).

On December 28, 1954, Local 23 wrote to Syres concerning the creation of Committees to meet "in an effort to reach some understanding that could be used as a satisfactory agreement" (Tr. 834).

Other documents in the record show meetings of April 11, 1955 (Tr. 844), May 10, 1955 (Tr. 845), and May 16, 1955 (Tr. 847).

The record also shows a meeting of October 5, 1955 between representatives of the two locals in which Local 23 advised 254 that the answer of the Company to the Union's

proposals would immediately be made known to Local 254 (Tr. 848-849).

On November 29, 1955 Local 23 transmitted to Local 254 the company's counter-proposal and requested a meeting with representatives of Local 254 (Tr. 850). This letter was referred to the Gulf group of Local 254 (Tr. 851) and on December 9, 1955 Local 23 was advised that the Local 254 Committee was ready to meet (Tr. 852).

On December 28, 1955, however, Local 254 wrote Local 23 that "we find we cannot accept a position without jeopardizing our entire position. We feel that the negotiations are entrusted to the Committee and you will do your very best for all concerned" (Tr. 853).

In 1955, Local 23 also requested Local 254 to create a committee for the purpose of bargaining with the Company (Tr. 308). By February 1956 the two Locals had worked up a satisfactory plan which was submitted to the company (Tr. 363). The first version of this Plan appears at Transcript 854 and the revised version at Transcript 856. These Plan were first drawn up by the attorney for Local 23 (Tr. 757) and were left with Local 254 for the approval of its membership and their attorney (Tr. 758). Local 254 did adopt the Plan (Tr. 758) and later the Local 254 committee met and bargained with the company concerning the solution to the problem.

There is an extensive description by a company witness of the bargaining with the company on this problem beginning at Transcript page 572. The union made the first proposal which was the Aiken Plan (Tr. 572, which the Company rejected (Tr. 573). Meantime, under Stipulation 33, the company was studying the solutions by competitors and was meeting with the union (Tr. 573). In

due course the company presented its proposal (Tr. 573-574), which was not well received by the unions because the company's proposal contained the principle of two starting jobs, this being opposed by Local 254 (Tr. 574). Attended by both racial groups, the bargaining continued with the negroes urging their views freely (Rec. 575). The compromise of all the conflicting views is described at Transcript 576, 577 and 578. During these negotiations the negro committee walked out (Tr. 578). The final solution to the problem was to give to the negro employee the right to bid in jobs in the operating mechanical division, provided he has the same high school education and passes exactly the same tests as employees of any race, thereby satisfying the company's demands on qualifications (Tr. 580). The company granted the negroes' demand to maintain only one starting job (Tr. 577). The significance of the arrangement is that the company loses its former right of original selection and its six months probationary period but at least obtains equal educational and mental qualifications.

As to why such a system had not been set up in 1954, the company witness testified that the company did not know how to go about it, the answer had not been thought out, and there was no prior experience in the industry (Tr. 580-581).

Local 23 introduced evidence that during these negotiations, the negro representatives were viciously pressured by others of their group not to negotiate (Tr. 743-744). The plaintiff Syres testified in this connection that three named persons were duly created by Local 254 to negotiate (Tr. 755), that they later resigned (Tr. 355), that it could be that there is a division of opinion within Local 254, which he would not deny (Tr. 756), that Syres

thought the Gulf group should not have ratified the proposals which were submitted to the company (Tr. 758), and that the jointly agreed plan was not understood by the duly elected committee members (Tr. 759).

The purpose of summarizing this evidence for the benefit of the Court is to show that Stipulation 33 meant exactly what it said; that Local 23 turned to the task at hand within 10 days of the April 17, 1954 contract and did not rest until the solution was found; that the company for its part carried out its promises fairly and demanded only due consideration of relevant factors necessary to the operation of its business; that the plaintiff Syres, as well as Local 254, obstructed progress by refusing to meet in the beginning, by refusing to lend their economic and mental powers to the problem, by refusing to take a position in the bargaining, and by scuttling the efforts of a duly authorized committee of Local 254 to bargain to a successful solution.

Returning for the moment to the demand which the union made upon the company in January 1954, it will be observed from the foregoing that the significance of the union's proposal was that the company would now be required to give up its right of selection, its educational and mental qualification requirements and its probationary period. On the question of qualifications, plaintiffs were careful to point out in the trial court below that they do not question or attack these standard qualifications. Plaintiffs' counsel stated: "But we have not argued against those qualifications as to the negroes. We only say they should have been applied the same to them as to the whites" (Tr. 589). The plaintiff, John Syres, explicitly testified to the same effect (Tr. 313-314). He explicitly denied any authority from his group or intention to seek to break

down the company's standard educational and other qualifications. The record shows that of the approximated 900 negroes in the plant (Tr. 561) only "a few" have high school education (Tr. 615). Of these not all would qualify according to the company (Tr. 615). The record shows that under the 1956 contract the company posted 20 jobs for pipe fitter helpers and received bids from 96 negroes. Of these 96, 34 presented high school diploma or the equivalent (Tr. 570). Twenty-nine of these had been tested and 5 made a passing grade (Tr. 570). The record also shows that out of 67 persons contacted during the above episode, the company obtained an ultimate qualification of five persons (Tr. 581). The company recently hired 53 negroes of which 24 were high school graduates, but only one passed the tests.

RULE 23(a) F.R.C.P.

Rule 23. Class Actions—(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

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JAMES R. BROWNING, Clerk

No. 510

IN THE

Supreme Court of the United States

October Term, 1958

JOHN SYRES and LOUIS J. WARRICK, *Petitioners*

v.

OIL WORKERS INTERNATIONAL UNION, LOCAL 23, ET AL., *Respondents*

REPLY OF RESPONDENT, GULF OIL CORPORATION

In Opposition to a Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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No. 510

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v.

OIL WORKERS INTERNATIONAL UNION, LOCAL 23, ET AL., *Respondents*

REPLY OF RESPONDENT, GULF OIL CORPORATION

In Opposition to a Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Preliminary Statement

Although this Court has held that the complaint filed by the Petitioners in the court below stated a claim within the jurisdiction of the District Court,[1] the labor contract forming the basis of the suit was superseded by a new contract before the cause was reached for trial.

[1] Syres v. Oil Workers Int. Union, Local 23, 350 U.S. 892 (1955)

The Petitioners made no complaint about the new contract, although it had been in effect for more than six months. At the time of trial all that then remained of Petitioners' suit was a simple action for monetary damages, all claims for other relief having been dismissed with no complaint being made therefor.[2]

Thus, contrary to the assertions of Petitioners that this cause is "important because it involves the administration of the National Labor Relations Act,"[3] in truth and in fact there is no question presented concerning *any* Federal Statute. The only question preserved is one relating to the type of proof required in a class action for damages. As will be discussed hereinafter, this question of somewhat doubtful importance affects only the two individual petitioners and no others.

There is no question of the enforcement of an alleged racially discriminatory contract or any facet of racial discrimination before this Court in any form whatsoever.

Counter Statement of Questions Presented

Respondent Gulf does not agree that this case presents the questions stated by petitioners. The only issues in this case are:

1. Whether an erroneous instruction on the measure of damages is material when the verdict finds no liability.

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[2] R. 197; Opinion of Court of Appeals, App. B, p. 15; 257 F. 2d 479, 481.

[3] Petition for Certiorari, p. 4.

2. Whether in a class action monetary damages can be awarded to a class as a class when the individuals comprising such class have proved no loss or injury.

Reasons For Denying the Writ

A. A JURY VERDICT FOUND THAT THE RESPONDENTS WERE NOT LIABLE, AND THEREFORE, AN ERRONEOUS INSTRUCTION, IF ANY, ON THE MEASURE OF DAMAGES WAS HARMLESS.

The jury found under general instructions the general verdict of no liability. Alternative forms of verdict were placed in the jury's hands and the court properly instructed the jury that "if your verdict is for defendants you need not consider the question of damages or the cause any further." Pursuant to these instructions, the jury found:

"WE, THE JURY, find for the defendants."

Numerous authorities have stated that an erroneous instruction on the measure of damages is harmless where the verdict finds no liability.[4] The rule emerging from these authorities is epitomized in *Blanton*, supra:

> " . . . Since the jury found no liability whatever it is manifest that any inaccuracies affecting only the amount of damages was harmless."[5]

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[4] **Tracy v. Terminal Railroad Association of St. Louis**, 170 F. 2d 635 (8th Cir. 1948); **Gulf Refining Company v. Fetschan**, 130 F. 2d 129 (6th Cir. 1942), cert. denied, 318 U.S. 764 (1943); **Byrne v. Greene**, 70 F. 2d 137 (1st Cir. 1934); **Blanton v. Great Atlantic & Pacific Tea Co.**, 61 F. 2d 427 (5th Cir. 1932), cert. denied, 288 U.S. 609 (1933); **Carter v. Atlanta & St. A.B. Railway Co.**, 170 F. 2d 719 (5th Cir. 1948); 14 Cyc. of Federal Procedure, p. 453.

[5] **Blanton**, supra, fn. 4, 61 F. 2d at P. 429.

Having wholly failed to make any proof of damages to *any* individual and having an adverse jury verdict on ultimate liability, petitioners are without standing to complain here.

B. PETITIONERS' CONTENTION THAT ALLEGED DAMAGES TO INDIVIDUALS SHOULD BE AVERAGED IN A CLASS ACTION IS LEGALLY UNTENABLE.

There being "a total absence of proof that any particular individual had suffered any damage by reason of the alleged discriminatory provisions of the 1954 contract,"[6] petitioner now advances the novel theory that the damages are to the class and not to the individual.

The trial court's charge on the measure of damages correctly sets out the law applicable to suits, such as this, to protect rights of individuals. In such cases, the value of the challenged right determines the amount of damages that will be recoverable.[7]

In *Carroll*, supra, Judge Hand said, "In suits based upon deprivation of employment the amount in controversy seems to be limited to loss of wages." In the case at bar, the essence of the complaint is that because of the alleged racial discrimination Negroes have been deprived of certain promotional opportunities at the Respondent's Refinery. The monetary value of this promotional opportunity could only be the difference in the monetary value of the job held and that to which the employee would

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[6] **Syres, et al. v. Oil Workers International Union, et al.**, 257 F. 2d 479 (5th Cir. 1958), at page 483.

[7] **Carroll v. Somervell**, 116 F. 2d 918 (2d Cir. 1941); **Dermody v. Smith**, 88 F. Supp. 620 (D.C. Ind. 1949); **Dewar v. Brook**, 16 F. Supp. 636 (D.C. Nev. 1936).

have acceded but for the actions of the Respondents. Since all Negro employees continued working throughout the contract period, the amount of damages sustained by any individual employee can only be equivalent to an amount which represents the difference between his actual earnings on the existing job and the amount he would have earned had he been assigned a job for which he was qualified.[8]

Assuming that this is a proper subject for a class action under Federal Rule 23(a) because a common question of fact (the alleged conspiracy) was present, the damage to each individual composing the class was a separate and distinct demand for money damages, and his recovery depends solely on whether or not he could show that he was otherwise qualified for advancement. This is so because the employer's duty to pay wages for any job arises solely out of a contract between the individual and the employer; and conversely, the employee's right to such wage is derived from the same source. Cf. *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, 348 U.S. 437, 464 (1955). In this case Mr. Justice Reed ruled that a labor organization could not maintain on behalf of its members a suit under the National Labor Relations Act for *accrued* wages because such a cause of action lay with the individual employee. It necessarily follows that a claim for loss of potential *increased* wages belongs exclusively to the individual employee. The subject matter of this suit, reimbursement for potential lost wages,

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[8] **Columbian Insurance Co. v. Wheelwright**, 7 Wheat 534, 5 L. Ed. 516 (1822); **Carroll v. Somervell**, supra; Note 7, **Central of Georgia Railway Co. v. Jones**, 229 F. 2d 648 (5th Cir. 1956); **Lambrou v. Miner**, 36 F. Supp. 451 (N.D. Ill. 1940); **Cooney v. Legg**, 34 F. Supp. 531 (S.D. Calif. 1940).

if any, properly belongs to the individual employee. In this respect, his right is totally unrelated and independent of the claim of fellow Negro workers.

Petitioners seek to recover money damages with "a pro rata right of participation therein"[9] for all employees, including those who had suffered no damages. This flies in the teeth of all legal precedent.

C. NO CONFLICT EXISTS BETWEEN THE DECISION BELOW AND ANY OTHER COURT OF APPEALS.

Petitioners, in attempting to justify issuance of certiorari, would have this court believe that the court below "has decided a federal question in a way which is in conflict with the decision of another Court of Appeals on the same matter."[10] The Petitioner mistakenly interprets the opinion of the Court of Appeals as holding that Rule 23, *Federal Rules of Civil Procedure*, is not applicable in a class action to recoup monetary damages for an alleged breach of a statutory duty imposed by the National Labor Relations Act.[11] Such a decision, says Petitioner, is in "direct conflict with a holding on the same issue in *Tunstall v. Brotherhood of Locomotive F. & E.* (CCA), 148 F. 2d 403." In truth, no conflict exists, for even a cursory reading of the *Tunstall* opinion reveals that the Court was concerned simply with a jurisdictional matter, that is, whether service of process upon individual members of a class against which class relief was sought was sufficient

[9] Petition for Certiorari, p. 9.

[10] Id., p. 6.

[11] Ibid.

to bring such class within the jurisdiction of the Court. On this point the Court said:

> " . . . We think that the suit here was unquestionably maintainable as a class suit and that there has been sufficient service upon representative members to give jurisdiction over the entire class constituting the Brotherhood."[12]

But no issue was made as to the representative status of the plaintiff Tunstall. Indeed, it was assumed that he was properly representing the class, and in the case at bar, neither of the respondents has ever contested the Petitioners' right to sue on behalf of other Negroes similarly situated, nor have any of the courts which have reviewed this case concerned themselves with the issue of whether or not this was a proper class suit. Certainly, Judge Rives' opinion cannot be taken as denying to the Petitioners the right to sue in such capacity. On the contrary, he assumes that the class action device is appropriate, when in his opinion he states "it is not enough to say that the right not to be discriminated against on account of race is joint or common, and that a class action is maintainable under Rule 23(a), *Federal Rules of Civil Procedure. Granted arguendo,* it nonetheless remains that *in such an action* the class can obtain only that relief to which it is entitled."[13] (Italics supplied). However, he quite clearly points out the proper procedure to follow in order to enable a court to award equal and exact justice:

> "Damages may sometimes be recovered in a class action, but where the damages, if recovered, would be

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[12] **Tunstall v. Brotherhood of Locomotive F. & E.**, 148 F. 2d 403 (4th Cir. 1945), at page 406.

[13] **Syres, et al. v. Oil Workers International Union**, 257 F. 2d 479 (5th Cir. 1958), at page 484.

in different amounts to separate individuals, the persons entitled thereto must be made parties or intervenors before the damages can be awarded."

Since each plaintiff's claim for damages was individual and several, and no specific property could be affected by the action, it was necessary that each individual assert his claim through intervention.[14] No individual made proof of any damages sustained; consequently, there could be no recovery.

This Court is committed to the proposition that "when two or more plaintiffs having separate and distinct demands unite in a single suit, it is essential that the demand of each be of the requisite jurisdiction amount."[15] In the language of Judge Rives: "Wages are, of course, separately and individually earned. Promotions and failures to promote are peculiar to the individual employee."[16] Under the provisions of Federal *Rule 23 (a)* the "right sought to be enforced for . . . the class is several" and each party seeking relief was required to establish his right thereto by affirmative evidence. Having made no such proof of damages, there can be no recovery by any petitioner.

Conclusion

The jury having resolved the basic fact issue of the alleged conspiracy against the Petitioners upon a fair charge against which no complaint is urged,[17] it is respectfully

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[14] **Schatte v. Int. Alliance of Theatrical Stage Employees, etc.**, 183 F. 2d 685, 687 (9th Cir. 1950), cert. den. 340 U.S. 827 (1950).

[15] **Pinel v. Pinel**, 240 U.S. 594, 596 (1916).

[16] **Syres v. Oil Workers International Union**, 257 F. 2d 479 (5th Cir. 1958), at p. 483.

[17] Charge: R. 770, et seq.; Verdict: R. 889.

submitted that the record would not have supported a monetary judgment for any petitioner.

WHEREFORE, premises considered, Respondent Gulf respectfully prays that the petition for the writ of certiorari be in all things denied.

Respectfully submitted,

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